Supreme Court, U.S.
FILED
MAY 7 2003
OFFICE OF THE CLERK

(1)

No. 021642

IN THE

Supreme Court of the United States

THOMAS JEFFERSON UNIVERSITY HOSPITAL AND
PHILIP HIRSHMAN, M.D.,

Petitioners,

and

HEE-OK PARK CHAI, M.D.,

Respondent,

v.

DIANE BYNUM AND FOUNTAIN PARRISH,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

BARBARA S. MAGEN, ESQUIRE
COUNSEL OF RECORD
POST & SCHELL, P.C.
19TH FLOOR
1800 J.F.K. BOULEVARD
PHILADELPHIA, PA 19103-7480
(215) 587-1000

Attorney for Petitioners

ST IVES BURRUPS/APPELLATE DIVISION, 1617 JFK BOULEVARD, PHILA., PA. 19103 (215) 563-9000

66 pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the decisions of the Pennsylvania appellate courts violate defendants' constitutional rights to due process and fundamental fairness by determining that evidence of abortion, in and of itself, is demonstrably prejudicial and therefore inadmissible despite the fact that plaintiffs placed the evidence directly in issue and despite the fact that defendants will effectively be precluded from defending serious allegations of fraud and conspiracy without the evidence?

2. Did the decisions of the Pennsylvania appellate courts violate defendants' constitutional rights to due process and fundamental fairness by ruling that it is permissible to let a jury infer conspiracy without plaintiffs having pled or proven the same and without giving defendants the opportunity to fully and completely respond to the allegations of conspiracy?

3. Did plaintiffs waive their right to challenge the trial court's admission of the abortion evidence since they brought Ms. Bynum's medical records, which included reference to her prior abortion, into question by alleging that defendants fraudulently altered the medical records, and then failed to request a mistrial or a cautionary instruction as to this evidence?

LIST OF PARTIES TO THE PROCEEDING

Petitioners are Thomas Jefferson University Hospital ("TJUH") and Philip Hirshman, M.D. Hereinafter, Dr. Hirshman and TJUH may be referred to collectively as "defendants."

Respondents are Diane Bynum ("plaintiff" or "Ms. Bynum") and Fountain Parrish. Hereinafter, Ms. Bynum and Mr. Parrish may be referred to collectively as "plaintiffs."

Respondent, Hee-Ok Park, M.D, a defendant in the trial court proceedings, is not involved in this appeal.

Corporate Disclosure Statement

TJUH is a non-profit corporation and is a subsidiary of TJUH System. There are no publicly held companies that own 10% or more of TJUH's stock.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
List of Parties to the Proceeding and Corporate Disclosure Statement	ii
Table of Citations	vi
Citation of Opinions and Orders Below	1
Statement of Jurisdiction	2
Constitutional Provisions, Treaties, Statutes, Ordinances and Regulations Involved	3
Statement of the Case	4
A. Procedural History	4
B. Factual History	5
Argument	8
A. The Decisions of The Pennsylvania Appellate Courts Violated Defendants' Constitutional Rights to Due Process and Fundamental Fairness by Determining that the Issue of Abortion, in and of Itself, is Demonstrably Prejudicial and Therefore Inadmissible Despite the Fact that Plaintiffs Placed the Abortion Evidence Directly in Issue and Despite the Fact that Defendants will Effectively be Precluded from Defending Against Serious Allegations of Fraud and Conspiracy Without the Evidence	8
1. The Pennsylvania Appellate Courts' Decisions Violate All Notions of Due Process and Fundamental Fairness by Excluding Highly Probative and Non-Inflammatory Evidence Essential to the Defense Against Plaintiffs' Serious Allegations of Fraud, Record Tampering and Conspiracy, as well as the Alleged Damages for Emotional Distress	12

TABLE OF CONTENTS

Page

2. The Pennsylvania Appellate Courts' Decisions Violate All Notions of Due Process and Fundamental Fairness by Usurping the Function of the Trial Court and Concluding that the Issue of Abortion, in and of itself, is Demonstrably Prejudicial and Inadmissible 15

B. The Decisions of the Pennsylvania Appellate Courts Violated Defendants' Constitutional Rights to Due Process and Fundamental Fairness by Ruling that it is Permissible to Let a Jury Infer Conspiracy Without Plaintiffs Having Pled or Proven the Same and Without giving Defendants the Opportunity to Fully and Completely Respond to the Allegations of the Conspiracy 18

C. Plaintiffs Waived their Right to Challenge the Trial Court's Admission of the Abortion Evidence Since They Brought Ms. Bynum's Medical Records, which Included Reference to Her Prior Abortion, into Question by Alleging that Defendants Fraudulently Altered the Medical Records, and then Failed to Request a Mistrial or a Cautionary Instruction as to this Evidence 19

Conclusion 21

Appendix:

Order of the Supreme Court of Pennsylvania dated February 6, 2003 ..... 1a

Order of the Supreme Court of Pennsylvania dated December 10, 2002..... 2a

Order of the Superior Court of Pennsylvania dated July 31, 2002 ..... 3a

Judgment and Memorandum of the Superior Court of Pennsylvania dated May 29, 2002..... 4a

TABLE OF CONTENTS

Page

Order of the Philadelphia County Court of Common Pleas dated November 21, 2000 . . . . . 20a

Opinion of the Philadelphia County Court of Common Pleas dated May 16, 2001 . . . . . 21a

TABLE OF CITATIONS

Page

Cases:

Allied Electrical Supply Co. v. Roberts, 797 A.2d 362 (Pa. Super. 2002), *app. denied*, 808 A.2d 568 (Pa. 2002) 20

Berry v. Deloney, 28 F.3d 604 (7th Cir. 1994) 14

Bynum v. Thomas Jefferson Univ. Hosp., 816 A.2d 1101 (Pa. 2002) 1

Chicchi v. SEPTA, 727 A.2d 604 (Pa. Commw. 1999), *app. denied*, 560 Pa. 750, 747 A.2d 371 (1999) . 12, 13

Coffey v. Minwax Co., Inc., 764 A.2d 616 (Pa. Super. 2000) 21

Commonwealth v. Bundy, 458 Pa. 240, 328 A.2d 517 (1974) 14

Commonwealth v. Luktisch, 451 Pa. Super. 500, 680 A.2d 877 (1996), *reh'g. denied* (Pa. Super. Sept. 6, 1996) 17

Commonwealth v. McMaster, 446 Pa. Super. 261, 666 A.2d 724 (1995) 16

Commonwealth v. Weber, 549 Pa. 430, 701 A.2d 531 (1997) 14

Daset Mining Corp. v. Industrial Fuels Corp., 326 Pa. Super. 14, 473 A.2d 584 (1984). 15

Dilliplaine v. Lehigh Valley Trust Co., 457 Pa. 255, 322 A.2d 114 (1974) 20

Farago v. Sacred Heart General Hosp., 522 Pa. 410, 562 A.2d 300 (1989) 14

Fernandez v. City of Pittsburgh, 164 Pa. Commw. 662, 643 A.2d 1176 (1994), *app. denied*, 544 Pa. 637, 675 A.2d 1253 (1996) 13

TABLE OF CITATIONS

Page

Freedman v. McCandless, 539 Pa. 584, 654 A.2d 529 (1995) 14

General Equipment Mfrs. v. Westfield Ins. Co., 430 Pa. Super. 526, 635 A.2d 173 (1993) 15

Harmar Ice Associates v. Lignelli, 546 Pa. 500, 686 A.2d 819 (1996) 9, 10

Hutchison v. Luddy, 763 A.2d 826 (2000), *app. denied,* 567 Pa. 743, 788 A.2d 377 (2001) 16

In re Adoption of Maisels, 395 Pa. 329, 149 A.2d 38 (1959) 14

Jahanshahi v. Centura Development Co., Inc., 816 A.2d 1179 (Pa. Super. 2003) 15

Kadel v. McMonigle, 425 Pa. Super. 253, 624 A.2d 1059 (1993), *app. denied,* 539 Pa. 652, 651 A.2d 539 (1994) 18

Kelly v. St. Mary Hospital, 778 A.2d 1224 (Pa. Super. 2001) 20

Martin v. Soblotney, 502 Pa. 418, 466 A.2d 1022 (1983) 12

Mathews v. Eldridge, 424 U.S. 319 (1976) 9

McGuire v. Shubert, 722 A.2d 1087 (Pa. Super. 1998), *app. denied,* 560 Pa. 707, 743 A.2d 921 (1999) . . 18

Montana v. Egelhoff, 518 U.S. 37 (1996) 9

P.C.S. v. J.E.B., 442 Pa. Super. 388, 659 A.2d 1043 (1995), *reh'g denied* (Aug. 8, 1995) 19

Plowman v. Plowman, 409 Pa. Super. 143, 597 A.2d 701 (1991) 9

Rudolph v. Pennsylvania Blue Shield, 553 Pa. 9, 717 A.2d 508 (1998), *rearg. denied,* 1998 Pa. LEXIS 2337 (Pa. Oct. 28, 1998) 9

Tagnani v Lew, 493 Pa. 371, 426 A.2d 595 (1981) . . . 20

TABLE OF CITATIONS

Page

Constitutional References:

U.S. Const., Amend. 14, §1 3

Pa. Const., Art. 1, §11. 3

Statutes:

28 U.S.C. §1257(a) 2

Rules:

S.C.R. 13.1 2

Pa. R. App. P. 302 20

Pa. R. App. P. 1123. 2

Pa. R. Evid. 401 . . . . . 12, 13

Pa. R. Evid. 402 12

Pa. R. Evid. 403 . . . . . 13 15, 16

Other Authorities:

G. Ronald Darlington, *et al.*, 1 *Pennsylvania Appellate Practice,* §302:1 (2d ed. 2002) 20

CITATION OF OPINIONS AND ORDERS BELOW

1. Order of the Supreme Court of Pennsylvania, dated February 6, 2003, denying defendants' Application for Reconsideration of the Pennsylvania Supreme Court's Order, dated December 10, 2002, denying the Petition for Allowance of Appeal. App. 1a. The Court's February 6, 2003 Order has not been officially published or reported.

2. Order of the Supreme Court of Pennsylvania, dated December 10, 2002, denying defendants' Petition for Allowance of Appeal. *Bynum v. Thomas Jefferson Univ. Hosp.*, 816 A.2d 1101 (Pa. 2002)(decision without published opinion); *see also* App. 2a.

3. Order of the Superior Court of Pennsylvania, dated July 31, 2002, denying defendants' Application for Reconsideration and/or for Reargument *en banc* of the May 29, 2002 decision of the Superior Court. App. 3a. The Superior Court's July 31, 2002 Order has not been officially published or reported.

4. Judgment and Memorandum of the Superior Court of Pennsylvania, dated May 29, 2002, reversing the Judgment entered in favor of defendants in the Philadelphia County Court of Common Pleas and remanding the matter for a new trial. App. 4a-19a. The Superior Court's Judgment and Memorandum have not been officially published or reported.

5. Order of the Philadelphia County Court of Common Pleas, dated November 21, 2000, denying plaintiffs' Motion for Post-Trial Relief, and the May 16, 2001 Opinion of the Court of Common Pleas in support of its November 21, 2000 Order. App. 20a-35a. The trial court's Order and Opinion have not been officially published or reported.

STATEMENT OF JURISDICTION

Dr. Hirshman and TJUH respectfully request that this Court review the May 29, 2002 Judgment of the Pennsylvania Superior Court, as well as the December 10, 2002 Order of the Pennsylvania Supreme Court which denied their Petition for Allowance of Appeal (emanating from the Superior Court's May 29, 2002 Judgment). A timely Application for Reconsideration of the Supreme Court's December 10, 2002 Order was filed in accordance with Pennsylvania Rule of Appellate Procedure 1123. In accordance with U.S. Supreme Court Rule 13.1, this Petition is being timely filed within 90 days of the entry of the February 6, 2002 Order of the Pennsylvania Supreme Court which denied defendants' Application for Reconsideration. *See* S.C.R. 13.1. This Court has jurisdiction to review the Orders in question pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., Amend. 14, §1.

The Pennsylvania Constitution, Article 1, Section 11 provides:

> All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

Pa. Const., Art. 1, §11.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Plaintiffs commenced this medical malpractice action against TJUH and Dr. Hirshman by the filing of a Complaint in the Court of Common Pleas of Philadelphia County, Pennsylvania. App. 21a-22a. Plaintiffs assert that Dr. Hirshman was negligent in failing to order appropriate follow-up testing after Ms. Bynum allegedly informed him that she was experiencing decreased fetal movement. Plaintiffs contend that Dr. Hirshman's alleged negligence caused the death of their unborn child and that they suffered resultant emotional distress. The only claim presented was for plaintiffs' emotional distress; there was no claim presented on behalf of the fetus. App. 22a.

This case was originally tried in April of 2000, and the trial resulted in a hung jury. App. 22a. The case was re-tried in June of 2000, and the trial resulted in a verdict in favor of Dr. Hirshman and TJUH. App. 22a. Following the defense verdict, plaintiffs filed a Motion for Post-Trial Relief, which was denied by Order dated November 21, 2000. App. 20a. Plaintiffs then filed an appeal with the Pennsylvania Superior Court. Following the filing of briefs and oral argument, a three-Judge Panel of the Court issued a Judgment and Memorandum, dated May 29, 2002, reversing the Judgment entered in favor of defendants and remanding the case for a new, and third, trial. App. 4a-19a.

Defendants filed an Application for Reargument *en banc* and/or for Reconsideration with the Superior Court, which was denied by Order dated July 31, 2002. App. 3a. Defendants then filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court. App. 2a. By Order dated December 10, 2002, the Court denied defendants' Petition for Allowance of Appeal. Consequently, defendants filed an Application for Reconsideration with the Supreme Court, which was denied by Order dated February 6, 2003. App. 1a.

Defendants are now filing this Petition for Writ of Certiorari asserting, *inter alia,* that the decisions of the Pennsylvania appellate courts violated their due process rights. Defendants raised the due process argument at their first opportunity, which was with the Supreme Court of Pennsylvania. In this regard, defendants' constitutional rights to due process and fundamental fairness were not violated until the Pennsylvania Superior Court reversed the decision of the trial court, thereby usurping the authority of the trial court and depriving defendants of their constitutionally-protected right to defend against plaintiffs' accusations of fraud, conspiracy and record tampering.

B. FACTUAL HISTORY

On December 20, 1996, when Ms. Bynum was 39 weeks pregnant, she presented to TJUH for a scheduled prenatal visit. She was examined by Dr. Hirshman. Ms. Bynum claims that she informed Dr. Hirshman that she had been experiencing decreased fetal movement since the evening of December 19, 1996. Dr. Hirshman specifically denied this allegation. App. 22a-23a. In fact, a review of the medical records demonstrates that Dr. Hirshman wrote on the prenatal flow record that there was a positive fetal heart rate and active fetal movement. App. 22a-23a. Dr. Hirshman testified that if Ms. Bynum had reported decreased fetal movement, he would have sent her to the labor and delivery area for immediate testing. App. 22a-23a. Instead, Ms. Bynum was advised to return in one week, and an induction was scheduled for December 30, 1996, if Ms. Bynum did not go into spontaneous labor prior to that time. App. 23a.

Ms. Bynum presented to TJUH on the evening of December 23, 1996, complaining of decreased fetal movement since that morning. App. 23a. She was seen by two resident-physicians, Dr. Mass and Dr. Brill, who consulted with Dr. Armstrong, the attending obstetrician on call. App. 23a. An ultrasound was performed, and it was determined that the fetus was dead. App. 23a. Ms. Bynum underwent a Pitocin induction and had a spontaneous vaginal delivery of

a non-viable female infant. Plaintiffs assert that they suffered emotional distress as a result of the birth of the non-viable fetus.

The sole issue in this case was whether Ms. Bynum did, in fact, advise Dr. Hirshman on December 20, 1996, that she had been experiencing decreased fetal movement. The evidence established that if Ms. Bynum advised Dr. Hirshman of decreased fetal movement, it was below the standard of care for Dr. Hirshman not to have ordered immediate follow-up testing. This is the only basis upon which plaintiffs could have successfully maintained a cause of action against defendants.

As noted previously, the parties disagreed as to whether Ms. Bynum advised Dr. Hirshman, on December 20, 1996, that she was experiencing decreased fetal movement. The medical record from the December 20, 1996 office visit supported Dr. Hirshman's testimony, in that it specified that there was positive fetal movement and an active heart rate. App. 22a-23a. Plaintiffs' only response to this evidence was to assert that the medical record must have been altered.

In fact, plaintiffs accused defendants of an elaborate scheme of conspiracy, record tampering and fraud which involved Dr. Hirshman allegedly returning to TJUH at some point after the incident occurred, destroying the original medical record from December 20, 1996, fabricating a completely new record that supported his "version" of the events of December 20, 1996, and having this newly fabricated record signed by an attending physician and placed back into the medical chart.

In order to meaningfully defend against plaintiffs' allegations of fraud and conspiracy, defendants attempted to establish, among other things, that each item in the allegedly fabricated record constituted a true and accurate depiction of Ms. Bynum's medical condition as it existed on December 20, 1996. Included in the medical record was Ms.

Bynum's history of prior pregnancies and the outcome of each. The record demonstrated that one of Ms. Bynum's prior pregnancies had ended in an abortion.

During the trial, defense counsel briefly questioned Ms. Bynum with respect to her prior abortion and concerning the fact that she had considered terminating the pregnancy in issue. The reference to the prior and contemplated abortion was factual in nature and was incredibly limited, consisting of only two pages out of the 700 page trial transcription. App. 32a-33a. Plaintiffs objected, however, asserting that the evidence was irrelevant and inflammatory.

The presiding trial judge assessed the evidence and determined that the accuracy of the medical record, including the history of abortion, was relevant and probative to the issue of liability, particularly since plaintiffs had accused defendants of tampering with the medical record. As such, Ms. Bynum's testimony with respect to all portions of the record that were, in fact, accurate (including the history of abortion) was relevant in order to rebut the allegations of fraud and record tampering. App. 32a. The trial judge also determined that the fact that Mrs. Bynum contemplated aborting the pregnancy in question was relevant to a determination of the issue of damages. Finally, the trial court determined that the evidence of abortion was not prejudicial in that it was not presented in an inflammatory or sensational manner and since reference to the abortion was brief and compassionate. App. 32a-33a.

On appeal, the Superior Court determined that the mere mention of abortion is demonstrably prejudicial due to the fact that the nation is polarized on the issue. App. 10a. Therefore, no matter how minor the reference to abortion was, it constituted reversible error. App. 10a. Defendants filed a further appeal to the Pennsylvania Supreme Court arguing that the Superior Court's decision violated their right to due process, since it left them without a meaningful way to challenge plaintiffs' allegations of fraud, conspiracy

and record tampering. Although the Supreme Court denied defendants' request for further review, defendants firmly believe that the notions of due process and fundamental fairness warrant this Court's review.

ARGUMENT

A. THE DECISIONS OF THE PENNSYLVANIA APPELLATE COURTS VIOLATED DEFENDANTS' CONSTITUTIONAL RIGHTS TO DUE PROCESS AND FUNDAMENTAL FAIRNESS BY DETERMINING THAT THE ISSUE OF ABORTION, IN AND OF ITSELF, IS DEMONSTRABLY PREJUDICIAL AND THEREFORE INADMISSIBLE DESPITE THE FACT THAT PLAINTIFFS PLACED THE ABORTION EVIDENCE DIRECTLY IN ISSUE AND DESPITE THE FACT THAT DEFENDANTS WILL EFFECTIVELY BE PRECLUDED FROM DEFENDING AGAINST SERIOUS ALLEGATIONS OF FRAUD AND CONSPIRACY WITHOUT THE EVIDENCE

The Pennsylvania appellate courts denied defendants their due process rights by depriving them of an opportunity to be heard in a meaningful place and in a meaningful fashion and by destroying their ability to defend against serious allegations of fraud and conspiracy. The courts' decisions set a dangerous precedent in that they allow parties to hide behind the allegedly repugnant nature of the very evidence which they themselves have admitted into the record and made the central issue in the case, thereby preventing any other parties aggrieved by the evidence from challenging the same.

In this regard, Ms. Bynum had a constitutionally-protected right to an abortion. She freely chose to place her medical records, which clearly documented her history of an abortion, into evidence and to make the contents of the medical records a central issue in the case. The Pennsylva-

nia appellate courts took a draconian step backwards by ruling that the issue of abortion is so repugnant that even defense counsel's **extremely** limited and sensitive reference to Ms. Bynum's prior and contemplated abortion, which was highly probative of the issues at hand, unduly prejudiced plaintiffs.

The lower appellate courts essentially allowed plaintiffs to raise the issue of abortion and then use it as a shield to prevent Dr. Hirshman and TJUH from defending against serious claims of record tampering, fraud and conspiracy. The courts' rulings violate all notions of due process and fundamental fairness, which are the very cornerstones upon which our legal system is based. This Court's intervention is clearly necessary in order to protect the fundamental rights of Dr. Hirshman and TJUH, as well as those of all other individuals similarly situated.

The "fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976); *Plowman v. Plowman,* 409 Pa. Super. 143, 597 A.2d 701, 705 (1991). Under Federal law, due process ensures that, absent any valid state justification, competent, reliable and relevant evidence must be admitted to provide procedural fairness and an opportunity to be heard. *Montana v. Egelhoff,* 518 U.S. 37 (1996). The exclusion of such evidence violates fundamental standards of due process and deprives defendants of the basic right to defend themselves. *Id.*

The Pennsylvania appellate courts recognize that due process, a concept deemed "incapable of exact definition," is a "flexible notion" which is intended to "ensure fundamental fairness." *Plowman,* 409 Pa. Super. at 143, 597 A.2d at 705; *see also Rudolph v. Pennsylvania Blue Shield,* 553 Pa. 9, 717 A.2d 508, 510 (1998), *rearg. denied,* 1998 Pa. LEXIS 2337 (Pa. Oct. 28, 1998); *Harmar Ice Associates v. Lignelli,* 546 Pa. 500, 686 A.2d 819, 820 (1996). As the Supreme Court of Pennsylvania has stated:

> Adjudicatory action cannot be validly taken by any tribunal whether judicial or administrative, except upon a hearing wherein each party has an opportunity to know of the claims of his opponent, to hear the evidence introduced against him, to cross-examine witnesses, to introduce evidence on his own behalf, and to make argument.

Harmar Ice Associates, 546 Pa. at 500, 686 A.2d at 821.

The requirements of due process and fundamental fairness mandate that evidence of Ms. Bynum's prior and contemplated abortion be admitted into evidence. In this regard, the sole issue in this case was whether Ms. Bynum did, in fact, advise Dr. Hirshman on December 20, 1996, that she had been experiencing decreased fetal movement. The evidence established that if Ms. Bynum advised Dr. Hirshman of decreased fetal movement, it was below the standard of care for Dr. Hirshman not to have ordered immediate follow-up testing. This is the only basis upon which plaintiffs could have successfully maintained a cause of action against defendants.

Dr. Hirshman testified that plaintiff never advised him of decreased fetal movement. To the contrary, Dr. Hirshman pointed out that the records from the December 20, 1996 office visit indicate that there was positive fetal movement and an active heart rate. Ms. Bynum testified, however, that she did advise Dr. Hirshman of decreased fetal movement. She further testified that if the medical records indicated the presence of positive fetal movement, then they were fabricated.

As such, in order to hold defendants liable, a jury must first find that the December 20, 1996 medical record (which included evidence of Ms. Bynum's prior abortion) was fabricated. To support their claims of record fabrication and tampering, fraud and conspiracy, plaintiffs accused Dr. Hirshman of returning to TJUH at some point after the incident occurred, destroying the original medical record

from December 20, 1996, fabricating a completely new record that supported his "version" of the events of December 20, 1996, and having this newly fabricated record signed by an attending physician and placed back into the medical chart.

Evidence of defendants' alleged scheme to defraud plaintiffs permeated the entire trial and impacted the testimony of each medical witness. In fact, two records custodians and Dr. Hirshman's supervising physician had to be called as witnesses for the sole purpose of refuting the allegations of record fabrication. The allegations of fraud and conspiracy were also the predominant theme running throughout plaintiffs' counsel's opening and closing statements.

Clearly, a finding of liability would be predicated solely upon which party's version of events the jury chose to believe. Therefore, evidence tending to prove the accuracy of the medical record, including plaintiff's documented past medical history, was highly probative. In order to successfully defend against plaintiffs' allegations, it was necessary for defendants to establish that each item in the allegedly fabricated record constituted a true and accurate depiction of Ms. Bynum's medical condition as it existed on December 20, 1996. Defendants had an absolute right to establish that each item on the December 20, 1996 record was accurate.

Allegations of a conspiracy on the part of the TJUH physicians to defraud plaintiffs and the court cannot be taken lightly, particularly since the success of plaintiffs' case depended ***solely*** upon the jury's acceptance of their allegations of fraud. As such, reference to Ms. Bynum's prior medical history (which was certainly material and probative to the claims being asserted against these defendants) was essential in order to defend Dr. Hirshman's character as well as the veracity of the information contained in the December 20, 1996 medical record.

The notions of due process and fundamental fairness, as well as the rules regarding the admissibility of relevant evidence, require that defendants be permitted to establish the accuracy and contemporaneousness of each element in the medical chart. The lower appellate courts' refusal to permit this narrow and limited cross-examination effectively precludes a proper defense. The resulting prejudice is particularly overwhelming in light of the fact that the reference to the prior abortion was sensitive and was incredibly brief, consisting of only one small part of defense counsel's cross-examination with respect to the accuracy of the entire medical chart.

1. The Pennsylvania Appellate Courts' Decisions Violate All Notions Of Due Process And Fundamental Fairness By Excluding Highly Probative And Non-Inflammatory Evidence Essential To The Defense Against Plaintiffs' Serious Allegations of Fraud, Record Tampering And Conspiracy, As Well As The Alleged Damages For Emotional Distress

The lower appellate courts' decisions were contrary to well-established Pennsylvania case law which provides that although evidence of an abortion might be distasteful and/or potentially inflammatory, it is still admissible, particularly since the evidence was relevant and probative to the claims being espoused by plaintiffs. In this regard, as Pennsylvania's Rules of Evidence direct, "relevant evidence" is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Pa. R. Evid. 401. Likewise, Pennsylvania's Rules of Evidence specify that "[a]ll relevant evidence is admissible, except as otherwise provided by law." Pa. R. Evid. 402; *see Martin v. Soblotney,* 502 Pa. 418, 466 A.2d 1022 (1983). Evidence is admissible "when it is relevant to a fact sought to be proved." *Chicchi v. SEPTA,*

727 A.2d 604, 607 (Pa. Commw. 1999), *app. denied,* 560 Pa. 750, 747 A.2d 371 (1999)(citing *Fernandez v. City of Pittsburgh,* 164 Pa. Commw. 662, 643 A.2d 1176 (1994), *app. denied,* 544 Pa. 637, 675 A.2d 1253 (1996)).

Here, the prior abortion was part of plaintiff's documented medical history, and the accuracy of the medical record, including the history of an abortion, was the central issue, and the overriding theme, in the litigation. The brief testimony concerning Ms. Bynum's prior and contemplated abortion was not presented in an inflammatory or sensational manner. The topic was quickly addressed, with compassion, and was very factually stated. It was not raised in either the opening or closing arguments or in the court's jury instructions. Indeed, the sum total of the testimony regarding the abortion is contained in only two pages of a 700 page trial transcription. This evidence was properly, and necessarily, admitted.

Moreover, in his Concurring and Dissenting Memorandum of May 29, 2002, Pennsylvania Superior Court Judge Michael T. Joyce acknowledged the overwhelmingly relevant and material aspects of the December 20, 1996 medical record and concluded that the probative value of the evidence of plaintiff's contemplated abortion was "not outweighed" by its prejudicial impact. App. 18a-19a. Judge Joyce specifically concluded that excluding evidence of the contemplated abortion would deprive the fact-finder of an accurate picture of Ms. Bynum's emotional disposition towards the fetus. App. 19a. Based on this conclusion, Judge Joyce declared that he would hold that evidence of Ms. Bynum's contemplation of an abortion is admissible for purposes of damages pursuant to Pa. R. Evid. 401 and Pa. R. Evid. 403. App. 19a.

Clearly, evidence with respect to Ms. Bynum's prior and contemplated abortion is relevant and admissible and the trial court's decision to admit this evidence is in complete accord with prior case law emanating from the Pennsylvania Supreme Court. In this regard, the Pennsylvania Supreme

Court has permitted references, during trials, to abortions, or to contemplated abortions, without any allegation of prejudice and without the need for a re-trial. *Commonwealth v. Weber,* 549 Pa. 430, 701 A.2d 531 (1997); *Freedman v. McCandless,* 539 Pa. 584, 654 A.2d 529 (1995); *Farago v. Sacred Heart General Hosp.,* 522 Pa. 410, 562 A.2d 300 (1989); *Commonwealth v. Bundy,* 458 Pa. 240, 328 A.2d 517 (1974); *In re Adoption of Maisels,* 395 Pa. 329, 149 A.2d 38 (1959). As in the above-cited cases, the reference to an abortion herein, was brief, concise, factual and caused no inflammatory reaction from the jurors.

Likewise, Federal courts have permitted references to abortions during a trial where the evidence is relevant. *See Berry v. Deloney,* 28 F.3d 604 (7th Cir. 1994). In *Berry,* the Seventh Circuit Court of Appeals specifically held that evidence concerning the plaintiff's abortions was relevant, since the jury could find that the evidence diminished the amount of the plaintiff's damages for pain, suffering and emotional injuries. *Id.* at 608. In reaching this determination, the Seventh Circuit stated that:

> We are satisfied that the trial court's balance of the probative value of the testimony concerning other sexual relationships and abortions against its potentially prejudicial impact was proper. *When the district court has weighed the probative value of evidence against the potential prejudice we are especially hesitant to reverse a Rule 403 decision. See Scaggs v. Consolidated Rail Corp.,* 6 F.3d 1290, 1296 (7th Cir. 1993).

Id. (emphasis added).

In accordance with both the Pennsylvania and Federal Rules of Evidence, defense counsel's fleeting reference to an abortion was highly relevant and probative, particularly in light of the seriousness of the allegations being asserted by plaintiffs as to fraud, conspiracy and fabrication of the medical record. The trial court properly weighed the

probative value of the evidence against its potential prejudice, in accordance with Pennsylvania Rule of Evidence 403, and admitted the same. The exclusion of this probative and non-inflammatory evidence at a third trial will effectively preclude defendants from defending against plaintiffs' allegations of fraud, conspiracy and record tampering and will deny defendants their due process rights.

2. The Pennsylvania Appellate Courts' Decisions Violate All Notions Of Due Process And Fundamental Fairness By Usurping The Function Of The Trial Court And Concluding That The Issue Of Abortion, In And Of Itself, Is Demonstrably Prejudicial And Inadmissible

Pennsylvania law clearly establishes a stringent standard that appellate courts must adhere to when reviewing the evidentiary rulings of a trial court. It is well established that questions concerning the admission or exclusion of evidence are within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. *See Jahanshahi v. Centura Development Co., Inc.*, 816 A.2d 1179 (Pa. Super. 2003)(citing *General Equip. Mfrs. v. Westfield Ins. Co.*, 430 Pa. Super. 526, 635 A.2d 173, 182 (1993)). In Pennsylvania, a trial judge has broad discretion regarding the admissibility of potentially misleading and confusing evidence. *Daset Mining Corp. v. Industrial Fuels Corp.*, 326 Pa. Super. 14, 473 A.2d 584, 588 (1984). Pennsylvania courts have consistently held that evidentiary rulings are better left to the discretion of the trial court, which has the ability to hear the testimony and to see the witnesses, rather than to the appellate courts, which must reach their own conclusions based upon a cold review of the record. *Id.*

Instantly, the Pennsylvania Superior Court bypassed, or even ignored, the trial court's balancing test, which was appropriately conducted in accordance with Pennsylvania

Rule of Evidence 403, and conclusively determined, based upon a cold review of the record, that the abortion evidence was demonstrably prejudicial. As demonstrated above, however, abortion evidence is not demonstrably prejudicial or repugnant, and it is properly admitted when, as in this case, it is probative of the issues at bar.

In fact, the lower appellate court decisions are in conflict with the Pennsylvania Superior Court's prior finding in *Hutchison v. Luddy,* 763 A.2d 826 (2000), *app. denied,* 567 Pa. 743, 788 A.2d 377 (2001), wherein the court recognized that although the repugnant nature of certain behavior, such as child molestation, renders it inherently inflammatory, it is nonetheless admissible if it is relevant. Specifically, in *Hutchison,* the plaintiff, a minor male with limited mental capacity, claimed that the defendant-priest had sexually molested him over the course of six years, beginning when he was ten years old. *Id.* at 830. The defendant-priest denied the allegations. *Id.* As a result, the plaintiff sought to introduce evidence that the defendant had molested other children.

The defendant asserted that prior instances of his pedophilic behavior with children other than the plaintiff were not admissible, since this evidence had only slight probative value and would be unduly prejudicial and likely to confuse the jury. *Id.* at 839. The trial court disagreed and admitted the evidence. On appeal, the Superior Court affirmed, noting that the admission of the evidence was critical, since the credibility of the victim's testimony was being attacked. *Id.* at 842. In so ruling, the Superior Court specifically stated that although the evidence of molestation and pedophilic behavior was obviously repugnant and distasteful, and potentially inflammatory, this type of evidence in child abuse and rape cases is always repugnant. *Id.* The fact that evidence is repugnant and potentially inflammatory does not render it inadmissible. *Id.; see also Commonwealth v. McMaster,* 446 Pa. Super. 261, 666 A.2d 724 (1995) (Superior Court affirmed the admission of

inflammatory evidence that a throat culture taken from the four year old victim of sexual molestation had tested positive for the presence of gonorrhea despite the fact that there was no evidence that defendant had ever had gonorrhea and despite the fact that it could not be established when the victim had become infected. The evidence was offered to establish that the child was molested, and the prejudice caused to the defendant by inflammatory nature of the evidence was immaterial.); *Commonwealth v. Luktisch*, 451 Pa. Super. 500, 680 A.2d 877 (1996), *reh'g. denied* (Pa. Super. Sept. 6, 1996)(defendant was charged with molesting his stepdaughter; uncharged acts of molestation by defendant on his natural daughter fourteen years prior held to be admissible when victim's credibility undercut by defense testimony).

Similarly, the fact that the issue of abortion is repugnant to certain people and potentially inflammatory, does not render relevant testimony regarding the same inadmissible. Simply put, the prior abortion was a part of Ms. Bynum's documented medical history, and the accuracy of that medical record, including the history of an abortion, was the central issue in the case. Moreover, the testimony concerning Ms. Bynum's prior and contemplated abortion was not presented in an inflammatory or sensational manner. The issue was addressed briefly, compassionately and in a very factual manner. It was not raised again in closing arguments or in the court's instructions to the jury.

As such, the trial court was in the best position to determine the admissibility of potentially inflammatory evidence. It is quite a draconian measure for an appellate court to disregard a trial court's balancing test and conclude, based upon a cold review of the record, that relevant evidence of abortion is demonstrably prejudicial and inadmissible due to the fact that the abortion issue polarizes our nation and may raise a negative inference in the minds of some. In this circumstance, the reference to abortion was overwhelmingly relevant in light of the scope

and seriousness of the allegations of record fabrication. Defendants' constitutional rights to due process and fundamental fairness have been destroyed as a result of the lower appellate court decisions and review by this Court is warranted in order to protect the rights of defendants and all others similarly situated.

B. THE DECISIONS OF THE PENNSYLVANIA APPELLATE COURTS VIOLATED DEFENDANTS' CONSTITUTIONAL RIGHTS TO DUE PROCESS AND FUNDAMENTAL FAIRNESS BY RULING THAT IT IS PERMISSIBLE TO LET A JURY INFER CONSPIRACY WITHOUT PLAINTIFFS HAVING PLED OR PROVEN THE SAME AND WITHOUT GIVING DEFENDANTS THE OPPORTUNITY TO FULLY AND COMPLETELY RESPOND TO THE ALLEGATIONS OF THE CONSPIRACY

In order to state a civil action for conspiracy, plaintiffs were required to allege: "(1) a combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose; (2) an overt act done in pursuance of the common purpose; and (3) actual legal damage." *See McGuire v. Shubert,* 722 A.2d 1087, 1092 (Pa. Super. 1998), *app. denied,* 560 Pa. 707, 743 A.2d 921 (1999)(citing *Kadel v. McMonigle,* 425 Pa. Super. 253, 624 A.2d 1059, 1063 (1993), *app. denied,* 539 Pa. 652, 651 A.2d 539 (1994)).

Instantly, plaintiffs neither pled nor proved that any conspiracy actually existed amongst these healthcare providers. However, once the jury was led to believe that such a conspiracy, and related fraud, took place, surely the healthcare providers were entitled to defend themselves through the full, and unencumbered, use of the December 20, 1996 medical record. A review of the trial transcription reveals that plaintiffs' allegations, pertaining to conspiracy and fraud, permeated the entire record including, but not

limited to, plaintiffs' counsel's opening and closing arguments as well as the testimony of most witnesses.

It was essential to plaintiffs' case that the jury accept their proposition that defendants conspired to fabricate a new medical record for the December 20, 1996 office visit. For this reason, plaintiffs' counsel's cross-examination of Dr. Hirshman focused not on the medical evidence, but on when Dr. Hirshman learned of the death of the fetus and why Dr. Hirshman's record, from the December 20, 1996 office visit, did not appear to be consistent with the remainder of plaintiff's medical record from the Outpatient Clinic.

Since the jury was permitted to consider the bald allegations of conspiracy, defendants were entitled to demonstrate the accuracy of all information in the record, including the prior abortion. To prohibit a defense to plaintiffs' claims of conspiracy presents a dramatic departure from the long-standing law in Pennsylvania and violates defendants' right to due process, thereby requiring a full and complete evaluation by this tribunal.

C. PLAINTIFFS WAIVED THEIR RIGHT TO CHALLENGE THE TRIAL COURT'S ADMISSION OF THE ABORTION EVIDENCE SINCE THEY BROUGHT MS. BYNUM'S MEDICAL RECORDS, WHICH INCLUDED REFERENCE TO HER PRIOR ABORTION, INTO QUESTION BY ALLEGING THAT DEFENDANTS FRAUDULENTLY ALTERED THE MEDICAL RECORDS, AND THEN FAILED TO REQUEST A MISTRIAL OR A CAUTIONARY INSTRUCTION AS TO THIS EVIDENCE

Plaintiffs themselves placed Ms. Bynum's medical history, including her history of abortion, directly in issue when they alleged that Dr. Hirshman destroyed the original medical record and fabricated a new record in support of his

"version" of the events in question. Surely, plaintiffs cannot be permitted to place the medical record before the jury and argue that it was fraudulently fabricated and then deprive defendants of their right and opportunity to prove the accuracy of the very contents that were allegedly fabricated.

Indeed, if plaintiffs sincerely believed that they were being unfairly prejudiced by the brief reference to an abortion, they could have, but did not, request a cautionary instruction and a mistrial. In this vein, the Pennsylvania appellate courts' rulings directly conflict with Pennsylvania's doctrine of waiver. Pennsylvania's Appellate Rules of Procedure, case law and commentary clearly provide that in order to properly preserve an issue for review, a party must make timely, specific objections at the trial court level and continue to raise and brief those issues, throughout the post-trial and appellate levels of litigation. Pa. R. App. P. 302; *Dilliplaine v. Lehigh Valley Trust Co.*, 457 Pa. 255, 322 A.2d 114 (1974); *see also* G. Ronald Darlington, *et al.*, 1 *Pennsylvania Appellate Practice*, §302:1 (2d ed. 2002).

Case law clarifies that in order to properly preserve a question for review, a party must make a timely, specific objection before the trial court and must have a full record relating to same. *Dilliplaine, supra.* Issues which are not properly preserved for review cannot be considered by an appellate tribunal, even though the alleged error may be basic or fundamental. *P.C.S. v. J.E.B.*, 442 Pa. Super. 388, 659 A.2d 1043, 1048 (1995), *reh'g denied* (Aug. 8, 1995); *see also Allied Electrical Supply Co. v. Roberts*, 797 A.2d 362, 365 (Pa. Super. 2002), *app. denied*, 808 A.2d 568 (Pa. 2002); *Kelly v. St. Mary Hospital*, 778 A.2d 1224, 1227-1228 (Pa. Super. 2001). Strict compliance with the procedures designed for issue preservation has been deemed essential in order to maximize the efficiency of the courts and to maintain and enhance the quality of the dispute resolution process. *Tagnāni v Lew*, 493 Pa. 371, 426 A.2d 595 (1981).

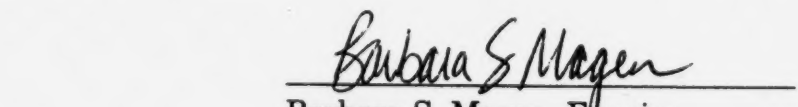
Instantly, since plaintiffs' counsel did not request a mistrial at the time that the reference to an abortion was

made, plaintiffs have waived their right to have a new trial conducted on the basis of the alleged error committed by the trial court. *Coffey v. Minwax Co., Inc.*, 764 A.2d 616, 622 (Pa. Super. 2000) (Superior Court concludes that where the plaintiffs had not asked for a mistrial or requested a cautionary instruction, they were not entitled to relief on the claim due to the waiver doctrine). As such, in the case at bar, the Superior Court's ruling, as well as the Supreme Court of Pennsylvania's corresponding denial of defendants' Petition for Allowance of Appeal, are in direct conflict with Pennsylvania's doctrine of waiver and the courts' decisions deprive defendants of their due process right to be heard in a meaningful manner, thereby warranting this Court's intervention.

CONCLUSION

For the foregoing reasons and in the interest of justice, Dr. Hirshman and TJUH respectfully request that this Court grant the instant Petition and accept this appeal.

Respectfully Submitted,



Barbara S. Magen, Esquire
POST & SCHELL, P.C.
19th Floor
1800 J.F.K. Boulevard
Philadelphia, PA 19103-7480
(215) 587-1000

Attorney for Petitioners